United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,669

EARL R. CEPHUS,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

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QUESTIONS PRESENTED

(1) Whether the District Court committed prejudicial and reversible error when it allowed, for impeachment purposes, a full oral confession, which was assertedly made to the police at the District of Columbia Jail after the preliminary hearing but prior to indictment when appellant was without assistance of counsel, to go to the jury to rebut specific and limited exculpatory statements made by appellant during the course of his testimony.

(2) Whether the District Court committed prejudicial and reversible error affecting substantial rights of the appellant by failing to caution or instruct the jury, either at the time of its admission or at the close of the trial, that the oral confession, used for impeachment purposes, could be considered only as bearing upon appellant's credibility as a witness and not as substantive evidence of his guilt, even though no request was made by appellant for such an admonition or instruction.

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UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,669

EARL R. CEPHUS,

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v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

On December 2, 1963, a four-count indictment was returned charging appellant with three counts of unauthorized use of a motor vehicle and one count of grand larceny of a camera. The United States District Court for the District of Columbia had jurisdiction by virtue of § 306 of Title 11 of the District of Columbia Code (1961 ed.).

Appellant was arraigned on February 20, 1964, and entered a plea of not guilty. Trial by jury was commenced before District Judge Edward A. Tamm on April 30, 1964 and concluded on May 4, 1964. On April 30, 1964, the District Court entered a judgment of acquittal on Count 3 (unauthorized use of a 1963 Ford convertible) and Count 4 (grand larceny of a Polaroid Land camera). On May 4, 1964, the jury returned a verdict of guilty on Counts 1 and 2 (unauthorized use of a 1963 Chrysler Newport and a 1962 Chevrolet Impala, respectively). On May 15, 1964, appellant was sentenced to imprisonment for a period of twenty (20) months to five (5) years on Count 1, and twenty (20) months to five (5) years on Count 2, the sentence on Count 2 to take effect at the expiration of the sentence imposed on Count 1. This appeal, which the District Court allowed without prepayment of costs, is from a verdict of guilty on Counts 1 and 2 and from the judgment and commitment thereupon filed.[1]

This Court has jurisdiction of the appeal by virtue of 28 U.S.C. § 1291.

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1. The judgment and commitment entered by the District Court erroneously states that appellant was convicted of "UNAUTHORIZED USE OF A VEHICLE and GRAND LARCENY (22 D.C. Code, 2204, 2201) as charged in Counts One and Two." As pointed out above, appellant was actually convicted of the unauthorized use offenses charged in Counts 1 and 2, but a judgment of acquittal was entered on the grand larceny offense (Count 4) as well as on another unauthorized use offense (Count 3).

STATEMENT OF THE CASE

Appellant was found guilty on Count One and Count Two of the indictment which charged him with unauthorized use of two motor vehicles, in violation of § 2204 of Title 22 of the District of Columbia Code (1961 ed.).

For the purpose of proving Count One, the government at the outset of the trial offered evidence through Alma W. Bowen and Robert M. Anselmo as to the ownership, custody and disappearance of a 1963 green Chrysler Newport from Royal Motors, located at Georgia Avenue and Upshur Street, N.W., sometime during the day on October 30, 1963 and as to the theft of two tires from the trunk of that car. While both witnesses stated that they did not know appellant and did not give him permission to drive that automobile, neither gave testimony that appellant took the car. (I Tr. 15-19 and 19-22)[2/]

Thereafter, Charles D. Francis, Jr., who was employed on October 30, 1963 by Weaver Brothers as a custodian for three buildings located at 920 Peabody Street,

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2. The transcript of the trial held on April 30 and May 4, 1964 is contained in two volumes. The symbol "I Tr." is used to refer to pages in the first volume (April 30, 1964), and the symbol "II Tr." will refer to pages in the second volume (May 4, 1964).

5928 and 5932 Ninth Street, testified, among other things, that, while appellant was not known to him, appellant "seems to be the one" whom he saw between 11:00 and 11:30 A.M. on October 30, 1963 transferring tires from the trunk of a green Chrysler, which was parked on a lot in the courtyard behind the buildings, to another car, the make of which Francis did not know. Francis also testified about a "snap" conversation he allegedly had with appellant at that time, his notification to the police, and a signed statement which he gave to the police.[3] (I Tr. 22-32)

Next, Detective Edward Guggenheim, of the Auto Squad, Metropolitan Police Department, testified about his investigation into the theft of a 1963 Chrysler, which included a meeting with Francis and the recovery of the automobile on October 31, 1963. (I Tr. 32-35)

To support Count Two, the government initially introduced a stipulation between counsel as to the testimony of Renee Miller had she been called as a witness and then offered evidence through Thomas B. Ehlers relating to the ownership, custody and disappearance of a 1962

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3. The statement made and signed by Francis, which was produced upon motion of appellant's trial counsel, was marked as Government Exhibit No. 1 for identification. (I Tr. 29)

light blue Chevrolet Impala from the service lot at Hicks Chevrolet, located in the 5900 block of Georgia Avenue, N.W., sometime prior to 12:15 P.M. on October 30, 1963. Ehlers further testified about property found missing from the car after recovery and about the breakage of the sun visor support. Although neither he nor Renee Miller gave permission to appellant to drive that automobile, there was no testimony that they saw appellant take it. (I Tr. 36-40)

In addition, there was testimony by Warren B. Brown, an officer of the Metropolitan Police Department, that, while riding in a patrol wagon with his partner, he observed appellant at Cushing Place and K Street, S.E. on October 30, 1963 at approximately 12:30 P.M. transferring a tire, tube and wheel back and forth between the trunk of a 1963 Ford, which was parked on a vacant lot adjacent to the street in the unit block of K Street, and behind the front seat inside a blue Chevrolet, which was parked on Cushing Place. (I Tr. 52-55) He also gave testimony about the identification[4] and the interrogation of appellant. The witness further testified that,

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4. An envelope containing appellant's Social Security card, draft card and business cardwas marked as Government's Exhibit No. 3 for identification (I Tr. 57) and later received in evidence. (I Tr. 73)

after appellant was told to follow the officers back to Haley's Ford in the Chevrolet so that they could check out his story, he got into the Chevrolet, proceeded north on Cushing Place, but never showed up at Haley's. (I Tr. 56-62)[5]

The final witness in the Government's case-in-chief was Detective Thomas J. Horrigan of the Auto Squad, Metropolitan Police Department, who testified with respect to the circumstances of appellant's arrest on the evening of October 30, 1963 and to the continuity of possession of appellant's identification cards. (I Tr. 70-73)[6]

On defense, appellant's first two witnesses were Larry Black and Charles Taitum, both of whom were incarcerated in the District of Columbia Jail at the time. In substance, their testimony disclosed that a man by the name of Frank Harris, and not appellant, was responsible for the theft of the two automobiles involved in Counts

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5. Officer Brown was also called by appellant on surrebuttal and testified further concerning his encounter with appellant. (II Tr. 172-174)

6. At this point the Government rested. Appellant's oral motion for judgment of acquittal was denied as to Counts 1 and 2. (I Tr. 74-77) Since a judgment of acquittal was entered on Counts 3 and 4, evidence offered by the Government to support these counts has not been summarized.

One and Two, on which appellant was convicted. (Black, I Tr. 77-94; Taitum, I Tr. 94-106)[7]

Taking the stand on his own behalf, appellant denied taking a Chevrolet or a Chrysler on October 30, 1963. (I Tr. 107-108)[8] He acknowledged his encounter with the police officers that day, while taking a short-cut through an alley on the way to a bus stop after having visited a friend, Willis White, in southwest Washington. (I Tr. 108-109) According to appellant, a 1962 Chevrolet and a 1962 Ford were parked side by side in the alley so as to block his path. He further testified that the patrol wagon drove up behind the Chevrolet immediately after he had replaced a tire on the bumper of the Ford, which had fallen to the ground as a result of a kick he had given it as he was walking between the two cars. (I Tr. 109) Appellant conceded that he was questioned

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7. In addition, Black and Taitum testified that Frank Harris had stolen the Ford and the camera involved in Counts Three and Four, respectively, of which appellant had been acquitted earlier. These witnesses further testified that they had not seen appellant until the day of the trial. (I Tr. 92 and 106) Both Black and Taitum were recalled to the stand on surrebuttal. Black testified about the removal of tires from a Ford and a Chrysler by Frank Harris. (II Tr. 179-180) Taitum gave testimony as to how he happened to be called as a witness. (II Tr. 175-178)

8. Appellant also denied taking a Ford or a camera on the same date.

by the officers about the automobiles and that he complied with their request for identification. (I Tr. 109-110) He then explained that he ran away in panic after the officers requested him to follow them to Haley's Ford in the Chevrolet because he thought he was being cross-examined for a crime.[9] (I Tr. 110-111)

Shortly after cross-examination of appellant commenced, the government requested permission to question appellant about "admissions" he made following his preliminary hearing on October 31, 1963. (I Tr. 114) Thereupon, the District Court, out of the presence of the jury, permitted the government to interrogate appellant and Detective Horrigan about statements which the appellant allegedly made to Detective Horrigan and Captain John G. Williams of the Auto Squad at the District of Columbia Jail on the morning of November 18, 1963. (I Tr. 114-119) At the conclusion of the interrogation, the District Court, over objections of appellant, ruled the alleged statements, which amount to a full oral confession, were admissible in evidence. (I Tr. 120-121)

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9. At the close of his direct testimony, appellant recited the circumstances under which he learned that Black and Taitum had information concerning the offenses with which he was charged. (I Tr. 111-113)

Thereupon, cross-examination of appellant was resumed in the presence of the jury. (I Tr. 121-128)

In response to questions propounded by the government, appellant admitted that Captain Williams and Detective Horrigan came to see him at the jail and that he was shown a signed statement made by the witness Francis but denied that he told these police officers that he stole the automobiles alleged in the indictment, that he would like to plead guilty to a misdemeanor for the theft of these automobiles, or that he would try to get the camera back if he were shown consideration. (I Tr. 125-128)[10]

On rebuttal, for the purpose of impeaching appellant's testimony, Detective Horrigan (I Tr. 131-144) and then Captain Williams (II Tr. 165-171) testified that, after being notified on November 18, 1963 by an employee of the District of Columbia Jail that appellant had made a request to talk to Captain Williams,[11]

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10. On redirect examination (I Tr. 128-130) and again on surrebuttal (II Tr. 180-182), appellant gave testimony concerning his interview by the police officers at the jail and denied making the statements attributed to him.

11. Orange C. Dickey, Supervisor of the Classification Office at the District of Columbia Jail, appeared and testified for the government about appellant's request to see Captain Williams. (II Tr. 156-164)

they went to the jail that morning and interviewed appellant. Their testimony further disclosed that, during the course of the interview, appellant inquired as to his chances of pleading guilty to a misdemeanor rather than felonies for the thefts of the automobiles alleged in the indictment; he admitted, in response to questioning, to taking the Chrysler, Chevrolet and Ford, as well as the camera; and he stated that, if he could get out on bond, he could get the camera back.

On cross-examination, however, Detective Horrigan conceded that appellant did not have counsel present when he made these statements and that appellant was not advised that anything that he said might be used against him. (I Tr. 143) Furthermore, the testimony of Captain Williams on cross-examination (II Tr. 169-170) and the records of the United States Commissioner reveal that at the time of the interview on November 18, 1963, appellant had been charged formally with only one offense.[12]

In the interval between the rebuttal testimony of Detective Horrigan and that of Captain Williams, appellant moved for a mistrial on Counts One and Two for

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12. See the complaint filed with the United States Commissioner by Detective Horrigan on October 31, 1963 and the Record of Proceedings before the United States Commissioner on October 31, 1963, Docket 11, Case No. 49.

the reason that the District Court erroneously allowed testimony concerning the alleged oral confession to be presented to the jury. In support of this motion, appellant maintained that since he was neither represented by counsel nor had the advice of counsel from the time of his arrest until the time of the police interrogation and had not waived his right to counsel during the said interrogation, the alleged confession was obtained in violation of his rights under the Fifth and Sixth Amendments and therefore could not be used by the government even to impeach his testimony in defense of the charges.[13] After argument by counsel, the District Court denied the motion and ruled that the rebuttal testimony of the police officers was admissible. (II Tr. 150-156)

The District Court did not caution or instruct the jury, either at the time of its admission or at the close of the trial, that the rebuttal testimony of the two police officers concerning the oral confession, which was used for impeachment purposes, could be considered only as bearing on appellant's credibility as a witness and not as substantive evidence of his guilt, even though

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13. See appellant's Motion for Mistrial on the Remaining Counts of the Indictment, filed May 4, 1964.

no request was made by appellant for such an admonition or instruction. Instead, the District Court gave an instruction on the alleged confession which indicated to the jury that it could be considered as substantive evidence of appellant's guilt. (II Tr. 208)[14]

STATEMENT OF POINTS

The District Court erred:

(1) In admitting into evidence for impeachment purposes a full oral confession elicited from appellant by the police at a time after preliminary hearing but prior to indictment when he was without the assistance of counsel.

With respect to Point 1, appellant desires that the Court read the following pages of the reporter's transcript: I Tr. 5, 107-121, 124-128, 131-135, 143; II Tr. 150-156, 165-171.

(2) In failing to caution or instruct the jury, either at the time of the admission or at the close of the trial, that the oral confession could be

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14. At the close of the instructions, the District Court, among other things, assumed for the record that counsel, especially defense counsel, renewed for the record all motions adversely decided and any objections theretofore voiced to any request made by opposing counsel and granted by the Court. (II Tr. 212)

considered only as bearing upon appellant's credibility as a witness and not as substantive evidence of his guilt, even though no request was made by appellant for such an admonition or instruction.

With respect to Point 2, appellant desires that the Court read the following additional pages of the reporter's transcript: II Tr. 184-186 and 200-214.

SUMMARY OF ARGUMENT

I

Over objection, the District Court erroneously allowed, for the purposes of impeachment, a full oral confession, which was assertedly made to two police officers at the District of Columbia Jail, to go to the jury to rebut specific and limited exculpatory statements made by appellant during the course of his testimony. The alleged confession was elicited between the preliminary hearing and the return of the indictment, during the course of an interview requested by appellant but in response to police interrogation. At the time, appellant, an indigent who was entitled to assistance of counsel, had not previously received advice of counsel. Moreover, it is undisputed that he did not have counsel present when the incriminating statements were made; nor

was he advised that anything he said might be used against him. Under the circumstances, the alleged confession was obtained in violation of appellant's Sixth Amendment right to counsel and was clearly within the exclusionary rule enunciated in the authoritative decisions of the Supreme Court and of this Court. As a consequence, it was unavailable to the government for its case-in-chief.

Furthermore, appellant's testimony on direct examination was specific and limited and the confession as narrated by the police officers was per se inculpatory. Thus, the alleged confession did not fall within the two recognized exceptions to the general rule that unlawfully obtained evidence which is unavailable to the prosecution to prove its case-in-chief is inadmissible for all purposes. Accordingly, the full oral confession should not have been received in evidence for any purpose.

II

The District Court failed to admonish or instruct the jury, either at the time of the admission or during the course of the trial, as to the limited effect of the oral confession used for impeachment purposes. Instead, that court gave a brief instruction on the alleged confession which indicated to the jury that it could be considered as substantive evidence of appellant's

guilt. Even though no request was made by appellant, the District Court's failure to so admonish or instruct the jury with respect to the confession, the admission of which was in and of itself prejudicial, unquestionably affected the substantial rights of appellant within the meaning of the plain error rule.

ARGUMENT

I

APPELLANT'S FULL ORAL CONFESSION WAS INADMISSIBLE IN EVIDENCE FOR IMPEACHMENT PURPOSES BECAUSE IT WAS OBTAINED IN A MANNER WHICH WAS INCONSISTENT WITH HIS RIGHT TO HAVE ASSISTANCE OF COUNSEL.

A. Appellant Was Entitled To The Assistance Of Counsel At The Time The Confession Was Made.

The Sixth Amendment, in pertinent part, provides:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

This right is of "such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions'". Powell v. Alabama, 287 U.S. 45, 67 (1932) "The purpose of the constitutional guaranty of a right to Counsel is to protect an accused from conviction

resulting from his own ignorance of his legal and constitutional rights . . ." Johnson v. Zerbst, 304 U.S. 458, 465 (1938). If the right is to be real rather than illusory, the "guiding hand of counsel" is essential to the accused "at every step in the proceedings against him". Powell v. Alabama, supra, at 69. It has not been confined merely "to representation during the trial on the merits", Moore v. Michigan, 355 U.S. 155, 160 (1957), but has been extended to earlier stages when legal advice is most essential to the accused.

Accordingly, the accused is entitled to legal assistance at arraignment. Hamilton v. Alabama, 368 U.S. 52 (1961); Evans v. Rives, 75 U.S. App. D.C. 242, 250, 126 F.2d 633, 641 (1942). The right to counsel also attaches at a preliminary hearing where prejudice may result. White v. Maryland, 373 U.S. 59 (1963); Wood v. United States, 75 U.S. App. D.C. 274, 128 F.2d 265 (1942).[15/] Recently, the Supreme Court held in Escobedo v. Illinois, 378 U.S. 478, 492 (1964) that "when the process shifts from investigatory to accusatory", the accused is entitled to consult with counsel during police interrogation.

In this jurisdiction, where the specific guaranty of the Sixth Amendment directly applies, Congress has

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15. Cf. Council v. Clemmer, 85 U.S. App. D.C. 74, 177 F.2d 22 (1949), cert. denied, 338 U.S. 880 (1949).

implemented the right to assistance of counsel for persons without means of their own to make the guaranty effective. Section 2202 of Title 2 of the District of Columbia Code (1961 ed.) provides that the Legal Aid Agency "shall make attorneys available to represent indigents in criminal proceedings in the United States District Court for the District of Columbia and in preliminary hearings in felony cases, and, . . . in proceedings before . . . the United States Commissioner." This section further requires that "Each such court and tribunal will make every reasonable effort to provide assignment of counsel as early in the proceedings as practicable."

In this case, appellant, who was twenty years old at the time[16] and an indigent, was arrested late in the evening of October 30, 1963. (I Tr. 71-72) On the morning of October 31st, he was brought before the United States Commissioner and charged with the commission of a felony.[17] Among other things, appellant was

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16. Appellant was 21 years old at the time of trial (I Tr. 108), having reached that age on December 16, 1963.

17. See the complaint filed with the United States Commissioner by Detective Horrigan on October 31, 1963. This is the same offense alleged in Count Two of the indictment.

informed of his right to counsel and was advised that any statement made by him might be used against him. Thereupon, with his acquiescence, the preliminary hearing was conducted, and he was held for the action of the grand jury.[18] Contrary to law, however, the Commissioner failed to assign an attorney to represent him.[19] Such an assignment would have continued until either the prosecution was terminated or another counsel was appointed.[20] As a result of the Commissioner's failure to perform the duty imposed upon him, appellant was deprived of counsel at and between the preliminary hearing and arraignment--a "critical" period prior to trial--when legal aid and advice was most necessary.[21] Had appellant "enjoyed" the

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18. See the Record of Proceedings before the United States Commissioner on October 31, 1963, Docket 11, Case No. 49.

19. See Blue v. United States, No. 18,401, decided October 29, 1964 (D.C. Cir.)

20. Board of Trustees Of The Legal Aid Agency For The District Of Columbia, Fourth Annual Report 11 (1964), provides in part:

> A staff attorney of the Agency assigned to represent a defendant in a preliminary hearing before the United States Commissioner considers himself still his attorney after the hearing, and to the extent possible begins before indictment to prepare for trial. Experience to date indicates that prompt investigation contributes to the correct and speedy disposition of criminal cases.

21. Counsel was not appointed for appellant until after arraignment on February 25, 1964.

assistance of counsel to which he was entitled, and had he been adequately informed of his rights, there is little likelihood that he would have made the alleged pre-indictment confession which was used against him at the trial.[22/]

The records of the United States Commissioner do not show whether appellant requested counsel or not at the time of the preliminary hearing. These records are likewise silent as to whether appellant was informed that he was entitled to have counsel appointed to represent him. In any event, it is of little consequence since it is now settled that "where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request". Carnley v. Cochran, 369 U.S. 506, 513 (1962). Moreover, there can be no presumption of waiver of counsel. The courts indulge every reasonable presumption against such a waiver. A waiver of a fundamental right cannot be presumed and it will not be found unless made intelligently by an accused fully aware of the consequences. Johnson v. Zerbest, supra.

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22. In Ricks v. United States, 118 U.S. App. D.C. ___, 334 F.2d 964, 970 n. 18 (1964), the government conceded during the oral argument that:

> When a defendant is represented by counsel, it is the practice of the United States Attorney not to permit any communication to be had by members of his staff or the police with the defendant except through, or with the permission of, counsel for the defendant.

B. The Oral Confession Was Unavailable To The Government For Its Case-In-Chief.

Confessions and other incriminating statements elicited at various stages after arrest and prior to trial when the accused is without the assistance of counsel are unavailable to the prosecution for its case-in-chief. Escobedo v. Illinois, 378 U.S. 478 (1964); Massiah v. United States, 377 U.S. 201 (1964); Johnson v. United States, No. 18,243, decided October 15, 1964 (D.C. Cir.); Queen v. United States, ___ U.S. App. D.C. ___, 335 F.2d 297 (1964); and Ricks v. United States, 118 U.S. App. D.C. ___, 334 F.2d 964 (1964).

In Escobedo, the incriminating statement held inadmissible was secured during police interrogation after arrest and prior to indictment, when the investigation was "no longer a general inquiry into an unsolved crime" but had "begun to focus" on the accused.[23] In Massiah, the incriminating statements were surreptitiously obtained by a federal agent after indictment while the accused was free on bail.[24] The confessions and incriminating statements excluded in Johnson,[25] Queen,[26] and

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23. 378 U.S. at 490-491.

24. 377 U.S. 201-203.

25. Slip opinion, p. 2.

26. 335 F.2d at 298.

Ricks[27] were elicited in the course of police interrogations during continuances of preliminary hearings granted for the purpose of enabling counsel to be obtained.

Here the alleged confession was produced as a result of police interrogation during the course of an interview with appellant at the District of Columbia Jail. This interview, which was requested by appellant, occurred on November 18, 1963,[28] between the time of the preliminary hearing on October 31, 1963 and the return of the indictment on December 2, 1963. Appellant had not previously received advice of counsel. Concededly, he did not have counsel present when he made the incriminating statements and was not advised that anything he said might be used against him. (I Tr. 143) Moreover, appellant had been charged formally with only one offense at that time. (II Tr. 169-170)[29] Clearly, under these circumstances, the alleged confession, the admissibility of which the government was evidently unsure,[30] was within the exclusionary rule enunciated in the decisions cited above

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27. 334 F.2d at 967.

28. I Tr. 131-134; II Tr. 165-168.

29. See also the complaint filed with the United States Commissioner by Detective Horrigan on October 31, 1963 and the Record of Proceedings before the United States Commissioner on October 31, 1963, Docket 11, Case No. 49.

30. At the outset of the trial, counsel for the government announced he would not use it in his case-in-chief. (I Tr. 5)

and was inadmissible as part of the government's case-in-chief.

Furthermore, the mere fact that appellant requested the interview with the police officers does not render the otherwise inadmissible confession admissible. In Ricks, the statements made by the appellant there after his initial appearance before the United States Commissioner were held to be inadmissible, even though they were voluntarily made after Ricks had consented to see the police officers in the cellblock and then repeated later that afternoon when he was released to the police at his request to assist them in the solution of certain unsolved crimes and to apologize to the victims.[31] Likewise, in Queen, the appellant in that case, while waiting to reappear before the United States Commissioner, assented to secret interrogation by police officers which produced the incriminating statements later held to be excludable.[32]

C. The Full Confession Was Inadmissible To Impeach Specific And Limited Exculpatory Statements Made By Appellant.

The oral confession, which was unavailable to the government for its case-in-chief, was likewise inadmissible

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31. Ricks v. United States, 118 U.S. App. D.C. ___, 334 F.2d 964, 976-978 (1964) (Bastian, J. dissenting).

32. Queen v. United States, ___ U.S. App. D.C. ___, 335 F.2d 297, 298 (1964).

in its entirety to impeach specific and limited exculpatory statements made by appellant during the course of his testimony.

It is settled law that illegally obtained evidence which is unavailable to prove the case-in-chief cannot be used for any other purpose. In other words, the prosecution cannot do indirectly that which it is forbidden to do directly. Agnello v. United States, 269 U.S. 20, 35 (1925); Silverthorn Lumber Co. v. United States, 251 U.S. 385, 391-392 (1920). On this point, the Supreme Court has expressly stated that:

> [T]he Constitution guarantees a defendant the fullest opportunity to meet the accusation against him. He must be free to deny all the elements of the case against him without thereby giving leave to the Government to introduce by way of rebuttal evidence illegally secured by it, and therefore not available for its case in chief. Walder v. United States, 347 U.S. 62, 65 (1954).

On the other hand, there are two limited exceptions to this rule. Walder v. United States, supra; Tate v. United States, 109 U.S. App. D.C. 13, 283 F. 377 (1960). In Walder, the Supreme Court held that the government was entitled to introduce on rebuttal evidence relating to matters independent of the offenses charged, and otherwise inadmissible, to impeach the defendant's

"sweeping claim" going "beyond a mere denial of complicity in the crimes of which he was charged".[33]

Then, in Tate, this Court announced that the government could introduce on rebuttal for purposes of impeachment those portions of statements obtained from the accused in an unlawful manner which related to "lawful proper acts", but which did not constitute "criminal acts" or "essential elements of the crime charged".

In this case, the use made by the government on rebuttal of the alleged oral confession to impeach appellant's testimony does not fall within either of these two limited exceptions. Appellant did not voluntarily

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33. In that case, a narcotics prosecution, the defendant testified on direct examination that "he had never dealt in or possessed any narcotics". On cross-examination, in response to government questioning, he denied that a heroin capsule, which had been unlawfully seized two years earlier, had been found in his possession on that occasion. On rebuttal, the government was allowed to impeach him by introducing evidence of the unconnected incident.

The Supreme Court explained the rationale of this exception by stating:

> It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths. Such an extension of the Weeks doctrine would be a perversion of the Fourth Amendment. 347 U.S. at 65.

make any "sweeping claim" on direct examination unconnected with the crimes charged. He merely "denied complicity" in those crimes (I Tr. 107-108) and gave his own account of the events relative to two counts in the indictment. (I Tr. 108-111) Consequently, the exception approved in Walder does not apply.

Nor was the disputed confession allowable under the exception recognized by this Court in Tate. Here, the conclusory narration by the police officers of appellant's responses to interrogation,[34] which appellant's trial counsel attempted to verify,[35] was per se inculpatory. Since it contained mostly admissions of

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34. For instance, the following questions and answers were given during Detective Horrigan's direct testimony on rebuttal:

> Q. Now, taking each automobile individually, will you tell the Court and jury what if anything the defendant said concerning that?
>
> A. Well, we asked the defendant about the Chevrolet from Hicks Motor Company and he stated that he had taken if from the Hicks Motor Company.
>
> We asked the defendant about the Ford from Haley's belonging to Mr. Bell, and he also admitted that.
>
> Q. What did he say? That is just a conclusion. What did he say?
>
> A. He stated that he was on the scene and taking a tire out of the car when the police officers approached. (I Tr. 134) See also II Tr. 167-168.

35. I Tr. 135-144; II Tr. 168-171.

criminal acts, it constituted a confession of the very charges for which appellant was on trial. Thus, the testimony of the officers "directly challenged the innocence, not merely the credibility"[36] of appellant. Moreover, no effort was made by the District Court, in accordance with recommended procedure,[37] to compare appellant's testimony with that of the two policemen and to receive in evidence only those portions of the policemen's testimony which did not "go to the admission of acts which constitute necessary elements of the crime itself, but which at the same time constitute true impeachment of sworn testimony . . ." Instead, the District Court erroneously allowed, for impeachment purposes, the entire oral confession to go to the jury.

In light of the foregoing authorities, the oral confession was elicited from appellant at a time when he was deprived of the assistance of counsel. As a consequence, it was unavailable to the government for

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36. Johnson v. United States, No. 18,243, decided October 15, 1964 (D.C. Cir.), slip opinion, p. 5.

37. Tate v. United States, 109 U.S. App. D.C. 13, 15 n. 3 (1960) and Lockley v. United States, 106 U.S. App. D. C. 163, 168-169, 270 F.2d 915, 920-921 (Burger, J. dissenting).

its case-in-chief. Furthermore, the oral confession was inadmissible in its entirety to impeach specific and limited exculpatory statements made by appellant. Unquestionably, the confession as admitted into evidence was prejudicial to appellant's defense. Jones v. United States, 113 U.S. App. D.C. 256, 258, 307 F.2d 397, 399 (1962). For these reasons, we submit that the District Court was in error when it permitted the government to introduce the confession through the testimony of two police officers on rebuttal.

II

FAILURE OF THE DISTRICT COURT, EVEN THOUGH NOT REQUESTED, TO CAUTION OR INSTRUCT THE JURY, EITHER AT THE TIME OF THE ADMISSION OF THE ORAL CONFESSION OR AT THE CLOSE OF THE TRIAL, AS TO ITS LIMITED EFFECT CONSTITUTED PLAIN ERROR AFFECTING SUBSTANTIAL RIGHTS OF APPELLANT.

The District Court failed to admonish or instruct the jury, either at the time of its admission or at the close of the trial, that the oral confession, used for impeachment purposes, did not constitute substantive evidence of appellant's guilt and could only be considered as bearing upon his credibility as a witness. Instead, the District Court gave a brief instruction on the alleged

confession which indicated to the jury that it could be considered as substantive evidence of appellant's guilt. (II Tr. 208) While no request was made by appellant for such an admonition or instruction, the failure of the District Court to advise the jury of the limited effect of the confession, under the circumstances of this case, constituted plain error seriously affecting the substantial rights of the appellant.

Clearly, the challenged confession, the admissibility of which even the government doubted, was inadmissible in its entirety for any purpose. Nevertheless, it was introduced and admitted on rebuttal at the instance of the government for the purpose of impeaching appellant's testimony. Since it was received on that basis, the District Court, at the very least, should have admonished or instructed the jury at some point as to its limited effect. Failure to do so aggravated the prejudice resulting from the erroneous admission of the full confession.

In Walder v. United States, supra, at 64, where extrinsic evidence otherwise inadmissible was admitted, the trial judge "carefully charged the jury that it was not to be used to determine whether the defendant had committed the crimes here charged, but solely

for the purpose of impeaching the defendant's credibility". Since the impeaching evidence in Walder was unrelated to the indictment, there was less likelihood of prejudice to the defendant there than it is here, where the impeaching evidence constituted a confession to the very charges for which appellant was being tried.[38]

Similarly, in Lockley v. United States, 106 U.S. App. D.C. 163, 165, n. 1, 270 F.2d 915, 917 n. 1 (1959), where a written confession not otherwise inadmissible was offered and admitted for the sole purpose of attacking the credibility of the defendant, the charge of the trial court not only "carefully limited the jurors to considering the written confession for impeachment purposes only", but "instructed them not to consider either admission [the written or oral confession] unless they first found it to be voluntary".

Equally important is the case of Stansbury v. United States, 219 F.2d 165, 167-168, 171-173 (1955). In that case the defendant was improperly cross-examined and impeached by the government with respect to extraneous matters. The United States Court of Appeals for the

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38. Johnson v. United States, No. 18,243, decided October 15, 1964, slip opinion, page 5.

Fifth Circuit held that the jury should have been advised by the trial court on its own accord as to the limited effect of such evidence and that the failure of the trial court to do so was not harmless error.

On the basis of the foregoing, the District Court's failure, even though not requested, to admonish or instruct the jury as to the limited effect of the oral confession, the admission of which was itself prejudicial, certainly affected the substantial rights of appellant within the meaning of Rule 52 (b) of the Federal Rules of Criminal Procedure and presents an additional ground for reversal.

CONCLUSION

For the foregoing reasons, it is submitted that the convictions of appellant should be reversed.

Respectfully submitted,

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APPENDIX A

CONSTITUTIONAL PROVISION, STATUTES AND RULE INVOLVED

The Sixth Amendment, in pertinent part, provides:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

Title 2, District of Columbia Code (1961 ed.), § 2202, provides:

> The Agency shall make attorneys available to represent indigents in criminal proceedings in the United States District Court for the District of Columbia and in preliminary hearings in felony cases, and in cases involving offenses against the United States in which imprisonment may be for one year or more in the Municipal Court for the District of Columbia, in proceedings before the Coroner for the District of Columbia and the United States Commissioner, in proceedings before the juvenile court of the District of Columbia, and in proceedings before the Commission on Mental Health of the District of Columbia and proceedings in the courts arising therefrom.
>
> The Agency shall from time to time advise each of the courts and tribunals named in this section of the names of the attorneys employed by the Agency who are available to accept assignments in said court or tribunal. The judges or other presiding officers of the several courts and tribunals may assign attorneys employed by the Agency to represent

> indigents, such assignments to be upon a case-to-case basis, a group-of-cases basis, or a time basis, as the assigning authority may prescribe. Each such court and tribunal will make every reasonable effort to provide assignment of counsel as early in the proceeding as practicable.

Title 22, District of Columbia Code (1961 ed.) § 2204, provides:

> Any person who, without the consent of the owner, shall take, use, operate, or remove, or cause to be taken, used, operated, or removed from a garage, stable or other building, or from any place or locality on a public or private highway, park, parkway, street, lot, field, inclosure, or space, an automobile or motor vehicle, and operate or drive or cause the same to be operated or driven for his own profit, use, or purpose shall be punished by a fine not exceeding one thousand dollars or imprisonment not exceeding five years, or both such fine and imprisonment.

Rule 52(b), Federal Rules of Criminal Procedure, provides:

> (b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,669

EARL R. CEPHUS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
VICTOR W. CAPUTY,
ALLAN M. PALMER,
Assistant United States Attorneys.

QUESTION PRESENTED

In the opinion of the appellee, the following question is presented:

Were appellant's admissions to the police admissible in the Government's case in chief consistent with his Sixth Amendment right to the Assistance of Counsel?

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* Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,669

EARL R. CEPHUS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant was charged with three counts of unauthorized use of a vehicle (22 D.C. Code, § 2204) and one count of grand larceny (22 D.C. Code, § 2201) in a four-count indictment filed December 2, 1963. On April 30, 1964 he was tried to a jury and subsequently convicted of two unauthorized use offenses. He was acquitted by the court on the other two counts of the indictment at the close of the Government's case in chief. Appellant was sentenced to imprisonment for a term of twenty months to five years for each car theft, the sentences were imposed consecutively.

The three cars, which were the subject of the indictment, were all allegedly stolen on October 30, 1963, from various automobile agency parking lots (Tr. 16-17, 36, 43, *Cf.* Indictment). Appellant was arrested that same evening and taken before the United States Commissioner the following morning, October 31, 1963 (Tr. 124-125). The Commissioner's notes of that proceeding, which are part of the instant record, indicate that a complaint was filed against appellant, sworn to by Detective Thomas J. Horrigan, charging Cephus with unauthorized use of a vehicle. (This charge was later embodied in count two of the indictment.) After being fully advised of his rights pursuant to Rule 5 of the Federal Rules of Criminal Procedure, appellant requested and obtained an immediate hearing on the complaint. The Commissioner, after taking testimony, found that probable cause had been established and held appellant for the action of the grand jury setting a $1,000 bond. When appellant elected to proceed without counsel at the preliminary hearing there is nothing in the record to indicate that he was then a de facto indigent or appeared as such. Indeed, his affidavit to proceed on appeal in *forma pauperis*, filed in the District Court on May 15, 1964, states that when arrested he had $100 on his person.

While at the D. C. Jail pending indictment, appellant on November 17, 1963, filed a signed request with the jail officials to have an interview with Captain Williams of the Metropolitan Police Auto Squad (Tr. 157-159). (His purpose in requesting the interview was generally stated to concern a newspaper article referring to him (Tr. 169).)

Orange C. Dickey, Supervisor, Classification Office, District of Columbia Jail, notified Captain Williams of appellant's request on November 18, 1963 (Tr. 156, 160). That same day Williams accompanied by Detective Horrigan [1] went to the jail and pursuant to procedure, filled

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[1] Although the transcript reads, "Det. Thomas Oregan" (Tr. 162), it is clear that Horrigan was intended. Volumes I and II of the transcript were prepared by different court reporters.

out a written request to see Cephus which the latter consented to (Tr. 162).

Previously, on direct examination, appellant had denied the instant car thefts (Tr. 109-113). On cross-examination the prosecutor sought to impeach him with certain statements made to Captain Williams at the jail on November 18th. At that point the court excused the jury to hear testimony concerning the making of these statements (Tr. 114-115). Appellant denied having requested to see the police or having made any admissions to them (Tr. 115-116). Detective Horrigan testified that after he and Captain Williams arrived at the jail pursuant to appellant's request, Cephus inquired of them whether it would be possible to plead guilty to misdemeanor charges rather than to felony indictments (Tr. 117-118). He also admitted taking all three cars. He was advised that the United States Attorney's office would be contacted with reference to his request (Tr. 119). The court concluded that this testimony was admissible.

The trial resumed and appellant, on cross-examination, again denied any prior admissions of guilt (Tr. 127-128). In rebuttal, Detective Horrigan testified about appellant's inquiry concerning pleas to misdemeanor offenses and having admitted the car thefts when asked about them individually (Tr. 131-132, 134). Captain Williams corroborated these admissions by Cephus (Tr. 166-168).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . ., to have the Assistance of Counsel for his defence.

Title 22, District of Columbia Code, Section 2204, provides:

> Any person who, without the consent of the owner, shall take, use, operate, or remove, or cause to be taken, used, operated, or removed from a garage, stable, or other building, or from any place or locality on a public or private highway, park, parkway, street, lot, field, inclosure, or space, an automobile or motor vehicle, and operate or drive or cause the same to be operated or driven for his own profit, use, or purpose shall be punished by a fine not exceeding one thousand dollars or imprisonment not exceeding five years, or both such fine and imprisonment.

SUMMARY OF ARGUMENT

Appellant was not denied the right to Counsel when he made admissions to the police at the jail some time after he had been advised of his rights by the Commissioner and had conducted his own preliminary hearing. The admissions were not the product of a conscious elicitation of a confession from him but rather the result of his own conduct in requesting to see the police in order to arrange for pleas to misdemeanor offenses for his car thefts rather than plead to felony indictments. Absent were a critical stage in the proceedings against him as that term is understood, or testimonial compulsion aimed at his self-incrimination.

ARGUMENT

Appellant was not denied the right to the Assistance of Counsel when he made admissions to the police.

In limine, appellee conceives the issue to be whether appellant's admissions at the D. C. Jail on November 18, 1963 were admissible in the Government's case in chief consistent with his Sixth Amendment right to the Assistance of Counsel. *Cf. Johnson* v. *United States*, —— U.S. App. D.C. ——, (No. 18244, October 15, 1964).

It is clear that appellant or any defendant is entitled to counsel at every stage in the proceedings against him

Powell v. *Alabama*, 287 U.S. 45 (1932), and that this right is not contingent upon his request for legal advice. *Carnley* v. *Cochran*, 369 U.S. 506 (1962). This right, of course, can be waived when the accused intelligently decides to proceed without counsel. *Moore* v. *Michigan*, 355 U.S. 155, 161 (1957). *Cf. Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938). The Supreme Court has previously held that once the judicial process commences any formal stage in the proceedings can be a critical one requiring the presence of counsel lest an accused's rights be irrevocably lost by his absence. *Hamilton* v. *Alabama*, 368 U.S. 52 (1961) (Petitioner pleaded not guilty at arraignment without counsel. *Held*: A denial of the right to counsel because this stage in the proceedings was in fact critical, for petitioner lost the right to interpose certain defenses thereafter); *White* v. *Maryland*, 373 U.S. 59 (1963) (At the preliminary hearing petitioner pleaded guilty to the offense when unrepresented by counsel. Although the plea was later withdrawn, it was utilized as an admission against him at the trial. *Held*: A denial of the right to counsel because the preliminary hearing was a crucial proceeding as to this defendant).

In *Massiah* v. *United States*, 377 U.S. 201 (1964), the Court apparently extended the logic of these cases to include informal questioning of an accused:

> "Any secret interrogation of the defendant, . . ., without the protection afforded by the presence of counsel, contravenes the basic dictates of fairness in the conduct of criminal causes and the fundamental rights of persons charged with crime." 377 U.S. at 205.

For Massiah, this interrogation aimed at eliciting his confession was in effect a critical stage in the proceedings against him which denied him his Sixth Amendment rights. *Cf. Escobedo* v. *Illinois*, 378 U.S. 478 (1964). In *Massiah* and *Escobedo*, "denial of counsel" emerges as the product of affirmative state action to procure confessions from uncounseled defendants once the right to counsel has attached.

> "We hold that the petitioner was denied the basic protections of that guarantee when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel." *Massiah* v. *United, States, supra,* at 206.
>
> "Petitioner had become the accused, and the purpose of the interrogation was to 'get him' to confess his guilt despite his constitutional right not to do so . . . .
>
> There is necessarily a direct relationship between the importance of a stage to the police in their quest for a confession and the criticalness of that stage to the accused in his need for legal advice." *Escobedo* v. *Illinois, supra* at 485, 488.

Accord: *Queen* v. *United States*, 335 F.2d 297 (D.C. Cir. 1964)

> "In the present case also the convictions were obtained by use at trial of self-incriminating statements of the accused elicited by extra-judicial secret police interrogation prior to trial." At 298.

Ricks v. *United States*, 334 F.2d 964 (D.C. Cir. 1964)

> "Here Ricks was committed to jail pending the determination of probable cause, and the hearing thereon was continued solely for the purpose of granting him an opportunity to obtain counsel. But the police nipped this opportunity in the bud by virtually following upon Ricks' heels, from the Commissioner's hearing room into the cellblock, to continue their interrogation." At 969. (footnotes omitted) (Opinion rested on supervisory power of the Court to deter this conduct.)

See also *People* v. *Dorado*, 40 Cal. R. 264, 394 P.2d 952 (1964) (*Rehearing granted*).

Thus, the touchstone in these cases is the quest for a confession by the police which makes the interrogative process critical to the accused in its thrust for his self-incrimination requiring the presence of counsel. Addi-

tionally, these opinions would also suggest a prophylactic aim. Since secret police interrogation can intrude at any time and thus engender a critical stage in the proceedings, as opposed to the known, formalized sequence of the judicial process *e.g.*, preliminary hearing, arraignment, etc., exclusion of a confession so obtained acts as a powerful deterrent to such *ex parte* conduct. However, absent this factor of affirmative police action in seeking a confession, the rule of the recent "denial of counsel" cases would not appear to be applicable.

In (John) *Jackson* v. *United States*, 337 F. 2d 136 (D.C. Cir. 1964), appellant on September 15, 1961, was arrested in New York City on a District of Columbia murder warrant. At 11 A.M. that same day he was presented before a United States Commissioner and advised of his rights. The following day two Metropolitan Police Detectives went to New York to return appellant on a removal complaint. The arrived about 1:30 P.M. and after advising him that he did not have to speak to them appellant, without any prodding, confessed the crimes. This Court held (one judge dissenting) there was no denial of the right to counsel. Absent was a police presence aimed at the conscious elicitation of a confession. The officers were lawfully there to remove appellant when he spontaneously confessed. On those facts the rule of Massiah's case was held not to be controlling.

Similarly, in the instant case, appellant was advised by the Commissioner that he need make no statement and that any statement he made could be used against him. Thereafter, he determined to act as his own counsel and attempted to secure misdemeanor dispositions for his crimes when he sought out Captain Williams.[2] (Although

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[2] This Court can judicially notice certain facts about this appellant which appear in the records of this Court and the District Court. *Brown* v. *Board of Education*, 344 U.S. 1 (1952); *Shafer* v. *Children's Hosp. Soc. of Los Angeles, Cal.*, 105 U.S. App. D.C. 123, 126, 265 F.2d 107, 110 (1959); *Fletcher* v. *Evening Star Newspaper Co.*, 77 U.S. App. D.C. 99, 133 F.2d 395 (1942), *cert. denied*, 319 U.S. 755 (1943); *(Henry) Jackson* v. *United States*, 336 F.2d 579, 581 (D.C. Cir. 1964) (Opinion of Bazelon, C. J. wherein judicial

appellant at first denied making this request to see Williams in emphatic terms (Tr. 115), after the Government moved into evidence the form he signed which contradicted his denial, the best he could muster was, "I don't remember requesting to talk to the officers." (Tr. 180). In light of this incontrovertible proof that he indeed

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notice is taken that in *United States* v. *Prince*, D.D.C. Crim. No. 349-63 (1963) a successful insanity defense was grounded in drug addiction. See also note 2 at 581); *Lopez* v. *Swope*, 205 F.2d 8 (9th Cir. 1953).

Appellant is no stranger to the police or to the judicial process. A prior conviction for unauthorized use of a vehicle was reversed by this Court not so long ago. *Cephus* v. *United States*, 117 U.S. App. D.C. 15, 324 F.2d 893 (September 12, 1963).

At trial, on cross-examination, appellant admitted pleading guilty to two counts of taking property without right in January 1962 (Tr. 113, 114).

In *United States* v. *Cephus*, D.D.C. Crim. No. 795-63, referred to in the instant record on appeal, appellant was charged with two vehicle offenses and petit larceny. On October 21, 1963, he was released on $300 bond and committed the instant offenses nine days later. He was acquitted of petit larceny and interstate transportation of a stolen vehicle and the jury hung on unauthorized use of a vehicle on April 7, 1964. After his conviction herein the District Court granted the Government's oral motion to dismiss the indictment on May 13, 1964. His extensive *pro se* pleadings in Crim. No. 795-63, are relevant and should be noticed by this Court.

One affidavit sworn to September 13, 1963, and filed with the District Court on September 17, 1963, is entitled, "Motion To Waive Right To Counsel". *Inter alia*, he informs the court that he had been studying criminal procedure for over two years and has the knowledge and qualifications to defend himself.

A second, sworn to September 26, 1963 and filed with the District Court on October 1, 1963 is entitled, "Motion For Re-Hearing Pursuant to Rule 5A Of The F.R.C.P." In it be bemoans the failure of the Government to sufficiently establish probable cause at his preliminary hearing.

A third, sworn to March 17, 1964 and filed March 19, 1964, is entitled, "Motion to Suppress". In it he claims that confessions were obtained from himself and a co-defendant in violation of the Mallory Rule. On page 2 of the affidavit he complains, "at no time during their detention at the precent [sic] was petitioner and Moore informed of their rights to silence or that the statements they made could be used against them." (Although this affidavit follows the jail interview of November 18, 1963, it has relevance to his claim in September of having studied criminal procedure for over two years). No *tabula rasa* this appellant.

sought the interview, counsel now concedes that request (Br. 21-22)).

Until he sought out the police, the latter were apparently content to rely on evidence *dehors* any confession or admissions of Cephus'. No investigation was focused on him November 18, 1963, with the purpose of eliciting a confession, there was thus, no critical stage in the proceedings against him as that term is currently understood, nor was there any testimonial compulsion requiring the balance of counsel's presence. Assuming that an inchoate right to counsel attached from the time of appellant's preliminary hearing, *compare Queen* v. *United States, supra, with Long* v. *United States,* —— U.S. App. D.C. ——, (No. 18368, October 22, 1964), there was no denial of that right when he voluntarily made the admissions to the police after seeking them out. Appellant played with the proverbial fire and was singed, even Prometheus did not escape unscathed. *Accord, Saunders* v. *United States,* 114 U.S. App. D. C. 345, 316 F.2d 346 (1963), *cert. denied,* 12 L.ed. 2d 299 (1964); *Nance* v. *United States,* 112 U.S. App. D.C. 38, 299 F.2d 122 (1962).

Further, the conduct of the police herein gives no rise for the need of a supervisory rule of exclusion, as their activities were not the *sine qua non* of appellant's admissions. *Fredricksen* v. *United States,* 105 U.S. App. D.C. 262, 266 F.2d 463 (1959).

The instant facts are not qualitatively different from the following hypotheticals which appellee submits would not have involved any denial of the right to the Assistance of Counsel.

1. Appellant loudly exclaimed his guilt from the jail cell and this was overheard by a guard.

2. Appellant noticed a guard standing outside his cell, called him over and related his guilt.

3. Appellant sent a letter to Captain Williams containing admissions of guilt. *Compare (John) Jackson* v. *United States, supra, with People* v. *Meyer,* 11 N.Y. 2d 162 (1962).

CONCLUSION

WHEREFORE, it is prayed that the judgment of the District Court be affirmed.

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REPLY BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,669

EARL R. CEPHUS,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

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(Appointed by this Court)

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,669

EARL R. CEPHUS,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR APPELLANT

In an effort to resist reversal, appellee argues that appellant was not denied the right to the assistance of counsel when he made incriminating statements to the police at the District of Columbia Jail, because these statements were voluntarily made during an interview requested by appellant after preliminary hearing and were

not consciously elicited by the police at a critical stage for the purpose of obtaining a confession.

At the outset, this argument conspicuously ignores a crucial point in the appeal that the incriminating statements directly resulted from the failure to appoint counsel at an earlier stage in the proceedings.[1] Appellant, an indigent, was entitled to have counsel assigned to represent him "as early in the proceeding as practicable".[2] Had counsel been assigned to represent

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1. See Brief for Appellant, pp. 18-19.

2. Title 2, Section 2202 of the District of Columbia Code (1961 ed.). Appellee suggests, however, that appellant was ineligible to have counsel appointed at the preliminary hearing and waived counsel at that stage in the proceedings (Br. 2, 7). Eligibility is disputed on the basis of a statement in appellant's affidavit to proceed on appeal in forma pauperis, filed with the District Court on May 15, 1964, that he had $100 at the time of his arrest.

On this point, appellee has obviously overlooked other statements in the same affidavit that show that appellant has no money, owns no bank accounts, savings accounts, stocks, bonds, automobile, real estate, or other valuable property, and has no wife, parent or other person who might be able to assist him in paying the cost of his defense. In addition, appellee has disregarded an earlier forma pauperis affidavit, executed by appellant and then filed with the court below on February 25, 1964, which expressly states that the above-mentioned $100 is "held by police as evidence".

As for the waiver of counsel, the law is clear that such a waiver cannot be presumed and will not be

appellant at the preliminary hearing, this assignment would have continued until either the prosecution was terminated or another counsel was appointed. When an accused has counsel, the United States Attorney does not allow any communication between the accused and the police, except through, or with the permission of, counsel for the accused.[3] Thus, it is most unlikely that appellant, with counsel assigned, would have requested an interview with the police for any purpose or would have made the alleged statements which were used to impeach his testimony at the trial. As a general rule, an accused, who "enjoys" the assistance of counsel, does not allow, much less request, an interview with the police.

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2. (Continued)
Rule unless intelligently and unequivocally made. Johnson v. Zerbst, 304 U.S. 458, 464-465 (1938). On the record in this case, there is no showing that appellant intelligently and unequivocally waived his right to counsel. Nor is there anything in this record to indicate that appellant was ever apprised by the United States Commissioner of the availability of a right to counsel to represent him. "[I]ndeed, the sheer mass of the papers recording the appointment of counsel [by the Commissioner] raises a strong inference to the contrary." Blue v. United States, No. 19,401, decided October 29, 1964 (D.C. Cir.), slip opinion, p. 10.

3. A similar assertion was conceded by appellee on oral argument in Nicks v. United States, 118 U.S. App. D.C. ___, 334 F.2d 964, 970 n. 10 (1964).

Furthermore, contrary to appellee's contention, the mere fact that the incriminating statements were made after the United States Commissioner had advised appellant that he need make no statement and that any statement he made could be used against him does not render admissible those statements obtained by the police while appellant lingered in an uncounselled status.[4]

According to the most recent decisions of this Court based on somewhat similar circumstances, it is the absence of counsel which controls and not a formal recital by the Commissioner pursuant to Rule 5 of the Federal Rules of Criminal Procedure. In Ricks v. United States, supra, certain statements voluntarily made by

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4. In an attempt to bolster this contention, appellee contends that appellant is no stranger to the police or to the judicial process and requests that this Court take judicial notice of several other criminal proceedings in which appellant has been involved and some of his pro se pleadings filed therein (Br. 7-8).

While appellant in the past has apparently had more than a passing acquaintance with the courts in this jurisdiction, the simple fact remains that he is not a lawyer and undoubtedly did not realize that some of the statements he allegedly made to the police would be used against him at his trial. Had appellant been as well versed in the law as appellee would have this Court believe, he would have asserted his indigency at the preliminary hearing, actively sought the benefits available to him under the Legal Aid Act and avoided any interview with the police.

the accused were held inadmissible at his trial because they were secretly obtained in the absence of counsel, notwithstanding the fact that prior to making the statements the accused had been before the United States Commissioner and a judge of the District Court, both of whom had advised him of his right to remain silent.

Similarly, in Queen v. United States, ___ U. S. App. D. C. ___, 335 F.2d 297 (1964), the incriminating statements secretly obtained by the police in the absence of counsel were found to be excludable, even though they were made voluntarily after the accused had been advised by the Commissioner of her right not to make a statement.

Advice from the United States Commissioner is quite different from, and no substitute for, advice by counsel. Yet, for the purpose of its argument here, appellee equates a routine notification by the Commissioner that the accused has the right to remain silent with the aid and advice of counsel. If such a view were to prevail, neither the Sixth Amendment guaranty to the assistance of counsel nor the supplementary provisions of the Legal Aid Act would be of any value to an indigent accused at the preliminary hearing stage of judicial proceedings in this jurisdiction. We doubt, therefore, that this Court will subscribe to any such proposition.

Finally, when appellee maintains that the incriminating statements were not consciously elicited from appellant by the police at a critical stage for the purpose of obtaining a confession,[5] it disregards some of the very testimony on which it relies to support the convictions.

Whatever the original purpose of the interview requested by appellant,[6] the record clearly discloses that the alleged oral confession was consciously elicited by the police during the course of their interrogation of appellant. On this point, the following testimony of Detective Horrigan is most explicit:

> Q. Now, taking each automobile individually, will you tell the Court and jury what if anything the defendant said concerning that?
>
> A. Well, we asked the defendant about the Chevrolet from Hicks Motor Company and he stated that he had taken it from the Hicks Motor Company.
>
> We asked the defendant about the Ford from Haley's belonging to Mr. Bell, and he also admitted that.

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5. Br. p. 9.

6. The written form which appellant signed at the D. C. Jail on November 17, 1963 and his testimony indicate that he requested to see Captain Williams of the Auto Squad about a newspaper article (II Tr. 159, 181). From the testimony of Detective Horrigan and Captain Williams, however, it would appear that the interview was requested by appellant for the purpose of inquiring as to the possibility of pleading guilty to misdemeanors rather than felonies (I Tr. 118, 133; II Tr. 166-167).

Q. What did he say? That is just a conclusion. What did he say?

A. He stated that he was on the scene and taking a tire out of the car when the police officers approached.

Q. Was there any statement made by the defendant as to whether he had taken that Ford?

A. He had, yes.

Q. Was any statement made by the defendant concerning the Chrysler?

A. Yes, sir. He was shown the signed statement of Mr. Francis and his statement in his own words was, "That's mine."

Q. That's mine what?

A. Well, I got the impression that he admitted the theft. In other words, that's one of the cars that I had taken.[7] (Underscoring Supplied)

Moreover, irrespective of appellee's claim to the contrary, the interrogation of the appellant quoted above was conducted at a most critical stage. At the time, appellant had not previously received advice of counsel. Admittedly, he did not have counsel present when he allegedly made the incriminating statements. Nor was he advised by the police that anything he said to them might be used against him.[8] Most importantly,

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7. I Tr. 134.

8. I Tr. 143.

appellant up to that time had been charged formally with only one offense.[9] However, after the extra-judicial police interrogation, he was indicted on four charges. Then, at the trial, the self-incriminating statements of the appellant elicited by the police were used to convict him. Obviously, the police interrogation under these circumstances constituted a stage equally as critical as the stages during which the incriminating statements and outright confessions were elicited from Massiah,[10] Escobedo,[11] Johnson,[12] Queen[13] and Ricks.[14] Just as those inculpatory statements were held to be improperly admitted, so were appellant's self-incriminating statements made in the absence of counsel clearly inadmissible.

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9. II Tr. 169-170 and the Record of Proceedings before the United States Commissioner on October 31, 1963, Docket 11, Case No. 49.

10. Massiah v. United States, 377 U. S. 201 (1964).

11. Escobedo v. Illinois, 378 U. S. 478 (1964).

12. Johnson v. United States, No. 18,243, decided October 15, 1964 (D. C. Cir.).

13. Queen v. United States, supra.

14. Ricks v. United States, supra.

In view of the foregoing, the judgment should be reversed and the case remanded for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

We hereby certify on the 31st day of December 1964, a copy of the foregoing Reply Brief for Appellant was served upon counsel for the appellee by delivering a copy thereof to David C. Atcheson, Esquire, United States Attorney, United States Courthouse, Washington, D. C.

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EARL R. CEPHUS,

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APPEAL FROM THE UNITED STATES DISTRICT COURT

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PETITION FOR REHEARING EN BANC

On June 21, 1965, a division of this Court rendered its opinion affirming the convictions here under review, with one member of the division concurring and Judge Washington dissenting. Pursuant to Rule 26 of the Rules of this Court, appellant respectfully requests the Court to rehear and reconsider en banc the important question raised in this appeal regarding the admissibility of an uncounseled confession.

Facts

Appellant, an indigent, was arrested during the evening of October 30, 1963. On the following morning, he was brought before the United States Commissioner and charged with unauthorized use of one automobile. According to the record of the preliminary hearing, appellant was routinely notified of his rights under Rule 5, including his right to retain counsel. Nothing in the record suggests, however, that he was informed of his right to appointed counsel or that he ever waived his right to counsel. With appellant's acquiescence, the preliminary hearing was conducted. At its conclusion, he was held for the action of the grand jury and committed to the District of Columbia Jail.

Two and a half weeks later, on November 17, 1963, appellant made a written request at the D.C. Jail to see Captain Williams or one of his aides in the Auto Squad "about an article in the paper which involved me." The next day, after receiving word of the request, Captain Williams and Detective Horrigan went to see appellant and he consented to see them. According to the police officers, appellant was questioned, confronted with a witness statement and then admitted taking a Chrysler, a Chevrolet and a Ford, as well as a camera. In addition, he purportedly inquired, during the course of the 50-minute interview, as to his chances of pleading guilty to a misdemeanor rather than to felonies.

At the time of the police interrogation, appellant

was not represented by counsel nor had he received advice of counsel from the time of his arrest.[1] Likewise, he was never warned by the two policemen that anything he said to them might be used against him. After the passage of more than two more weeks, on December 2, 1963, a four-count indictment was returned charging appellant with three counts of unauthorized use of a motor vehicle and one count of grand larceny.

At the trial, the Government, evidently unsure of the admissibility of appellant's confession, did not rely on it as part of its case-in-chief. However, after appellant took the stand and denied taking the automobiles alleged in the indictment and denied on cross-examination making the incriminating statements attributed to him, the Government offered the testimony of Captain Williams and Detective Horrigan. Following a hearing, out of the presence of the jury, the District Court, over objections, admitted the testimony of the police officers on rebuttal for impeachment purposes. While appellant's trial counsel failed to make a request, no admonition or instruction was given the jury by the District Court, either at the time of its admission or at the close of the trial, as to the limited effect of the alleged oral confession used for purposes of impeachment.

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1. Counsel was not appointed for appellant until after arraignment on February 25, 1964 - nearly four months after arrest.

After the conclusion of the trial, the jury returned a verdict of guilty on two counts of unauthorized use, [2] for which appellant was sentenced to imprisonment for a period of twenty months to five years on each count to run consecutively, for a total sentence of forty months to ten years.

On this appeal, appellant urged reversal on two related grounds. Initially, he contended that the incriminating statements elicited from him during the course of police interrogation, which was conducted in the interval between the preliminary hearing and the return of the indictment when he was without the assistance of counsel, were inadmissible for impeachment purposes. In connection with this point, the Government conceded on oral argument that these statements were not properly admitted for impeachment if they were not admissible as part of the Government's case-in-chief. Secondly, appellant maintained that the trial court erred when it failed to admonish or instruct the jury, either at the time of admission or at the conclusion of the trial, as to the limited effect of the incriminating statements used for impeachment purposes, even though no request for such an admonition or instruction was made.

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2. The District Court entered a judgment of acquittal on one unauthorized use count and the grand larceny count at the close of the Government's case-in-chief.

Reasons For Rehearing En Banc

Appellant submits that an en banc rehearing and reconsideration of this appeal is needed for the following reasons:

1. The views expressed in the majority and concurring opinions by two members of the division assigned to this appeal with respect to the admissibility of appellant's uncounseled confession not only differ sharply from those shared by their dissenting colleague but are in conflict with the views in the majority opinions in Ricks v. United States, 118 U. S. App. D. C. 216, 334 F.2d 964 (1964); Queen v. United States, 118 U. S. App. D. C. 262, 335 F.2d 297 (1964); and Johnson and Stewart v. United States, ___ U. S. App. D. C. ___, 344 F.2d 161 (1964). At the same time, the majority and concurring opinions in this case clash with the rationale of the exclusionary rule as enunciated by the Supreme Court in Massiah v. United States, 377 U. S. 201 (1964) and Escobedo v. Illinois, 378 U. S. 478 (1964).

In instances where differences of opinion have arisen among circuit court judges over an important legal issue, a rehearing en banc is both necessary and appropriate to resolve those differences. 3/ Until the difference of opinion among the judges of this circuit is resolved with

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3. Western Pacific Railroad Corp. v. Western Pacific Railroad Co., 345 U. S. 247, 260 n. 20 (1953). See also concurring opinion of Justice Frankfurter, 345 U. S. at 270-271.

respect to circumstances under which the rule excluding uncounseled confessions is to be applied, decisions in individual cases, such as appellant's and others similarly situated, will depend on the composition of the divisions of this Court which hear and consider the appeals.

2. The majority and concurring opinions, differing as they do from the dissenting opinion and from recent majority opinions of other divisions of this Court in Ricks, Queen and Johnson and Stewart, supra, also will create confusion and uncertainty as to the future application of the law relating to the admissibility of uncounseled confessions. As a result, those initially concerned with the application of the exclusionary rule in the administration of criminal justice in the District of Columbia -- the police, the prosecutors and the trial judges -- can no longer be sure when confessions and other incriminating statements obtained from accused persons in the absence of counsel fall within or are excepted from the coverage of that rule.

The possibility of confusion and uncertainty is demonstrated in the first instance by the various interpretations placed upon the decisions in the Massiah and Escobedo cases. From the majority and concurring opinions, it would appear that the exclusionary principle established by the Supreme Court in those cases is applicable only to cases of an exact factual likeness. [4/] On the other hand,

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4. Majority op., p. 3; concurring op., p. 6-7.

the dissenting opinion here and the majority opinions in Ricks, Queen and Johnson and Stewart, supra, have applied the Massiah-Escobedo principle to facts which are in some respects different but logically called for the application of that principle.

Furthermore, the majority and concurring opinions seem to rely upon factors which have not been considered, either by the majority of other divisions of this Court or by the dissenting member of the division here, as a bar to the exclusion of uncounseled confessions. For instance, the majority opinion, by quoting a portion of the Ricks opinion which refers to the fact that the police interrogation there was promptly resumed after that defendant's first hearing before the Commissioner,[5] apparently places some importance on the interval between the preliminary hearing and the time the accused is questioned by the police. However, as the dissenting opinion points out, "the speed of pursuit factor has been recognized to be irrelevant in Queen (2-week lapse between original hearing and subsequent questioning) and in Johnson and Stewart (19-day lapse)."[6]

According to the majority opinion, it is also significant that the police interrogation here occurred after the completion of the preliminary hearing, rather than during the course of a continuance of such a hearing granted for

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5. Majority op., p. 3.
6. Dissenting op., p. 14, n. 6.

the purpose of obtaining counsel, as in the Queen and Johnson and Stewart cases.[7] Yet, the dissenting opinion indicates that the fact that the preliminary hearings had not been completed in Ricks, Queen and Johnson and Stewart is insignificant because the records show that the defendants in those cases had been notified of their rights to the same extent as had this appellant. Moreover, the fact that appellant's preliminary hearing had been completed did not divest him of his right to assistance of counsel.[8]

Apart from these factors, both the majority and concurring opinions rely most heavily on the fact that appellant requested the interview with the police officers.[9] Nevertheless, as the dissenting opinion states:

> . . . appellant's written request to see Captain Williams indicates that he sought the interview in order to discuss a newspaper article that had been published about him. The testimony of the policemen indicates that it was their confronting appellant with damaging evidence and questioning him which diverted the interview and elicited the admissions from appellant that he had taken the four automobiles.[10] (Underscoring supplied)

Moreover, the defendants in Ricks, Queen and Johnson and Stewart, supra, voluntarily agreed to private interviews

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7. Majority op., p. 4.
8. Dissenting op., p. 15, n. 7.
9. Majority op., p. 4-5; concurring op., p. 8.
10. Dissenting op., p. 16.

with the police. Notwithstanding their consents, the uncounseled confessions obtained by the police in those cases were found to be excludable. As a matter of fact, in Ricks the defendant, during the course of an interview with the police in the cellblock immediately after his original hearing, "requested a piece of paper and a pencil, which were provided," and "[h]e then indicated in writing seven various locations where he had broken into houses, further indicating that he had sexually attacked a woman in four of the instances, . . ." Next, when shown a copy of a police memorandum enumerating and summarizing various unsolved sexual crimes that were still under investigation, Ricks indicated those crimes which he had committed by signing his name under the particular summary. Thereupon, he informed the police officers that he wanted to see and talk with the victims and apologize to them. Later that afternoon, when he appeared before a judge of the District Court on a motion seeking his release to the custody of a Deputy United States Marshal and two police officers to assist them in the solution of certain unsolved crimes, he indicated at least twice in response to inquiries by the court that he wanted to go with the police to various scenes to assist them in the investigation of certain crimes. Then, after the District Court read the order authorizing his release to the Deputy Marshal and the police officers, he replied in the affirmative when he was asked by the court whether he wanted the court to sign that

order.[11]

More importantly, however, the private interview with the police at the D. C. Jail would not have occurred had counsel been assigned to represent appellant at the preliminary hearing, because the assignment would have continued until either the prosecution was terminated or another counsel was appointed.[12] When an accused has counsel, the United States Attorney does not permit any communication between the accused and the police, except through, or with the permission of, counsel for the accused.[13] Thus, appellant's incriminating statements which were elicited by the police during the course of the interview directly resulted from the failure to appoint counsel to represent him at an earlier stage in the proceedings.

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11. Judge Bastian's dissenting opinion in Ricks v. United States, 334 F.2d at 976-978, 118 U. S. App. D. C. at 226-230.

12. Board Of Trustees Of The Legal Aid Agency For The District Of Columbia, Fourth Annual Report 11 (1964), provides in part:

> A staff attorney of the Agency assigned to represent a defendant in a preliminary hearing before the United States Commissioner considers himself still his attorney after the hearing, and to the extent possible begins before indictment to prepare for trial. Experience to date indicates that prompt investigation contributes to the correct and speedy disposition of criminal cases.

13. A similar assertion was conceded by appellee on oral argument in Ricks v. United States, 118 U. S. App. D. C. 216, 222, 334 F.2d 964, 970, n. 18 (1964).

Conclusion

For the foregoing reasons, as well as for those set forth in the briefs of appellant filed herein, [14] it is requested that the Court grant a rehearing en banc and, upon reconsideration of the decision in this appeal, enter an order reversing the convictions and vacating the judgment and sentence below.

Respectfully submitted,

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(Appointed by this Court)

July 2, 1965

Certification of Counsel

We hereby certify that this petition is filed in good faith and not for purposes of delay.

David W. Kindleberger

Victor P. Kohl, Jr.

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14. It is further requested that appellant's principal and reply briefs be incorporated herein and made a part of this petition.

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of July, 1965, the foregoing Petition for Rehearing En Banc was served upon counsel for the appellee by delivering a copy thereof to David C. Acheson, Esquire, United States Attorney, United States Courthouse, Washington, D.C.

David W. Kindleberger